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AN ABOMINABLE ANACHRONISM OF JUSTICE—INCARCERATION OF PERSONS ALLEGED TO BE INSANE WITHOUT THE INTERVENTION OF A JURY.

When Charles Reade's Hard Cash awakened England to the fact that Englishmen were being deprived of their liberties by means of false allegations of insanity and were suffering at the hand of covetous relatives—tortures far worse than death—because of a law that permitted incarceration without investigation, the whole world stood aghast at the revelation, and the possibilities which the awful practices suggested.

We are witnessing to-day in the city of New York an anachronism reviving in an altered form this ancient injustice, to-wit, the incarceration of persons alleged to be insane and their indefinite confinement by order of court without the intervention of a jury, and this, too, against the consent of the "patient" and of the patient's family.

We do not know Harry K. Thaw, nor his family, nor are we interested in that case any further than in the fact that it suggests what may happen in similar cases. But the possibilities of the New York procedure in cases of insanity are astounding in their awful significance and should cause every man who loves liberty and every lawyer who is jealous of the due administration of the law to reflect seriously what justification there may be for procedure, suggested though it may be by modern medical science, which leads to such results.

Such a procedure is a reflection on the sense of justice of the people of New York. Nor is it any answer for them to say that such practices have the indorsement of the medical profession and that this is a field for medical, not for legal, intervention. No greater fallacy exists to-day than this. The medical profession, by their training, have little sense of exact justice. Their microscopic observation of things leads them to magnify molehills into mountains, until they cannot see a case before them in any broader relation than that of the bodily infirmity they are examining. Frequently have we heard experts on the stand swear to the fact that thousands of people who never have seen an insane asylum have minds more or less disordered in some aspect of mental activity. To put the priceless heritage of our personal liberty at the whims of such a class of men is the crime of modern civilization.

Some courts have said so, and we honor them. These courts have denominated the insane asylum as a prison-house, though a palace, and imprisonment therein is a deprivation of liberty, and that a person cannot be deprived of his liberty therein without the intervention of a jury. In re Bryant, 3 Mackey 489; Fisius v. Turner, 125 Ind. 46; Territory v. Sheriff, 6 Mont. 297; In re Lindsley, 46 N. J. 358; De Hart v. Condit, 51 N. J. 611; In re Dickie, 7 Abb. (N. C.) 417; Commonwealth v. Kirkbride, 2 Brewst. 419; Eslava v. Lepretre, 21 Ala. 504; In re Day, 9 N. J. Eq. 181; Burke v. Wheaton, 3 Cranch C. C. 341; Smith v. People, 65 Ill. 375.

The defenders of the New York procedure will make bold to say that the determination of a man's insanity is not a criminal proceeding, and therefore no jury is necessary, which defense, however, comes with poor grace from a state where the prosecuting attorney is permitted to throw the entire influence of his office and his position against a patient who is seeking release from an asylum on the ground that he is cured. When Harry K. Thaw was declared not guilty of the crime for which he was indicted, the state's criminal law was vindicated and no further interest should the

administrators of the criminal law have in his case. Immediately upon the verdict he became a free man, guiltless of any crime against the state, and but for the fact that the jury found that he was insane at the time he committed the act alleged as a crime, he might have gone hence from the court without hindrance. However, he goes to Matteawan, not as a prisoner but as a patient, with the avowed intention on the part of the state not to punish him, but to cure him and let him go as soon as possible. So far we are satisfied with the course of justice prescribed by the New York law.

From this point on, however, the record is shameful. In the asylum he is treated cruelly, worse than any prisoner, so the evidence discloses. To such an extent was this true that the court in the subsequent proceeding of the patient's release was constrained to rebuke the authorities of the asylum for their inhuman treatment of this patient. Then, on application for a writ to inquire again into the patient's (no prisoner's) present mental condition, the prosecuting attorney appears on the scene again, this time to contest the application. Why? Thaw is no longer a prisoner. He is a man guilty of no offense whatever against the law. Why, then, the implacable and bitter resistance by the state, and by its criminal officials against the application of an innocent man seeking release from confinement on the ground that he is sufficiently cured of his malady to be set at liberty. Any state should hang its head in shame that would make such a spectacle possible.

But the defenders of the New York procedure, abandoning their first position, now declare that the patient is worse than a patient, he is a prisoner, not for crime, but for an insane condition dangerous to society and for which he must be confined. When this view of the case is admitted, however, then every drop of Anglo-Saxon blood boils at the indignity of deciding such a question without the intervention of a jury. If against the wishes of a private citizen, innocent of any crime, and of his family, the state, of its own motion, is determined to drag a man away from his family, take away his property and deprive him of his liberty, the most fundamental principle of magna charta provides that this shall not be done except upon the verdict of the "twelve good men and true."

We admit that it is exceedingly difficult for us to discuss this subject dispassionately. The outrage seems so heinous in our view of the case, and the violation of all fundamental principles of a constitutional government seem to be so plain that we cannot force ourselves to the judicial attitude which it is possible for us to assume on more debatable questions. The procedure in New York as illustrated in the Thaw case is an abomination and a stench in the nostrils of free American citizens. It permits unfair revenge to be taken by the state when a prisoner slips from its grasp on the plea of insanity, and we cannot say that such revenge has not been taken in the case of Thaw, and therefore would not be taken in the case of any other citizen.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW — BERTILLON SYSTEM.—The Court of Appeals of Maryland goes into the question quite elaborately whether and to what extent photographs and measurements for identification may be taken of persons taken in custody on felony charges. Downs v. Swann, 73 Atl. 653. The conclusion goes upon the theory that it is not an unconstitutional extension of arrest and holding in custody until a preliminary hearing, or exhibiting one for identification to another injured by the commission of a crime, but the photographs should not be used for exhibition to outsiders or put in a rogue's gallery except after conviction.

As we understand also the opinion, the taking of these photographs and measurements is part and parcel of making more secure the custody, in that it reduces the temptation of escape or of making attempts in that way. The opinion concedes there is some authority the other way, as to which there is quite an extensive note in 7 L. R. A. (N. S.) 274,

to the case of Schulman v. Whitaker, 117 La. 703, 42 So. 227, but generally authority is in accord with this case. The Schulman case shows that injunction will control the use of the photograph. A New York case deeming that a statute requiring photographs and measurements after conviction, to be filed, held in a case where one was convicted, his case reversed and then an acquittal, that still these photographs might be retained, and the only relief was through the legislature. Molineux v. Collins, 177 N. Y. 395.

Judge Alvey, of District Columbia Court of Appeals, in Shaffer v. U. S., 24 App. D. C. 417, discussed this question very fully, and we make the following extract from his opinion:

"In taking and using the photographic picture there was no violation of any constitutional right. We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and without such means many criminals would escape identification or conviction. It is one of the usual means employed in the public service of the country, and it would be a matter of regret to have its use unduly restricted upon any fanciful theory of constitutional privilege. * * * It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen while in prison by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mark in court, to enable witnesses to identify him as the party accused, as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for the purpose of identification."

PLEA IN ABATEMENT—RESETTING OF CAUSE BY AGREEMENT CONSTITUTING WAIVER OF ATTACK ON JURISDICTION.—The case of Columbia Brewery Co. v. Forgey, 120 S. W. 625, decided by St. Louis Court of Appeals, presents what seems to the writer an anomaly in the law, if that case was properly decided. The defendant being held out of his county, so that a plea in abatement would, under the Missouri statute, rightly lie, was held to have waived his plea by certain record recitals. One of these recitals was that the parties plaintiff and defendant appeared by their respective attorneys and by agreement of parties the cause was reset for trial at the foot of the docket, and the other was to the effect that the parties plaintiff and defendant appeared by their respective attorneys and by agreement of parties the cause was continued. The court said: "It therefore conclusively appears that notwithstanding the plea in abatement, the defendant appeared twice in the cause touching the matter of its disposition, and the plea in abatement to the jurisdiction was held to have been waived and it was accordingly overruled."

The opinion shows, or at least we so construe the language of the opinion, that the only pleading by defendant was a plea in abatement, challenging the jurisdiction of the court over his person. At all events, the holding of jurisdiction is not predicated on the pleadings of defendant, but upon the record recitals above stated. Those recitals, it seems to us, refer to the cause as at issue, and it was at issue only on the plea in abatement. The court cites cases to the effect that defendant, taking a change of venue, his appearance for the setting of the cause at the foot of the docket and his consenting or agreeing to a continuance, are all waivers of jurisdiction over the person, but do these cases, or any of them, show a case standing at issue solely on plea in abatement, challenging jurisdiction of the person? One of the cases shows a trial on the merits before the question was raised. Another, where there was defective service, defendant moved for change of venue and then said the court to which it had been remanded on his motion had no jurisdiction of his person, the motion (after judgment for non-appearance) being to quash the service. In another all that is said is: "The defendant appeared in the cause and had the case put at the foot of the docket." As to the cited cases, where there was consent to continuance, one shows that "after the adverse ruling and judgment on the defendant's plea to the jurisdiction he filed his application for change of venue, and by agreement change was made" to a certain county. The court said: "When that judgment was rendered the question of jurisdiction was no longer an issue in the case." The other two show agreements to continue preceded a motion to dismiss. Here the plea in abatement preceded the continuance, that it presented the only issue, and that only was continued. The point apparently ruled seems that one filing a plea in abatement cannot move for a continuance of the trial of that, nor can he consent to such a continuance without abandoning his plea. We confess our inability to understand why this should be so. On the contrary, the only purpose of a plea in abatement might be to await the determination of another matter. We believe it is competent to continue almost any issue at law without thereby killing it.

WHAT EMPLOYEES COME WITHIN THE PROTECTION OF THE FEDERAL EMPLOYERS' LIABILITY ACT?

The Federal Employers' Liability Act, passed by congress last year, provides that "a common carrier by railroad while engaging in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," when the injury occurs under any of the circumstances set forth, e. g., by the negligence of a fellow servant. As might have been expected, the question has arisen as to when employees of such a railroad are engaged in interstate commerce.

Thus far no decisions interpretating this act have been given down by the higher courts, so we are obliged to fall back upon a construction of the phrase "interstate commerce," and upon such support as can be derived from the Safety Appliance Act and from state statutes analogous to the one under consideration.

We are aided at the outset by the principle of construction that has been laid down by the supreme court of the United States in interpreting the Safety Appliance Acts. In the case of Johnson v. Southern Pacific R. Co., decided by the circuit court of appeals,[1] the statement was made of that act that it was a penal statute and "it may not be so broadened by judicial construction as to make it cover and permit the punishment of an act which is not denounced by the fair import of its terms." But upon an appeal being taken to the supreme court of the United States, the decision in favor of the railroad was reversed, it being held that the construction put upon the Act by the lower court "was altogether too narrow. The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law, and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws. And, as Chief Justice Parker remarked, conceding that statutes in derogation of the common law are to be construed strictly, 'they are also to be construed sensibly, and with a view to the object aimed at by the legislature.'[2] The primary object of the act was to promote the public welfare by securing the safety of employees and travelers, and it was in that aspect remedial."[3]

The case of employees engaged in the actual operation of a train is easier of solution than is the case of those not so employed. A train might be engaged in the transportation of *intra* as well as *inter*state commerce, yet an employee thereon would undoubtedly be protected by the Employers' Liability Act.

Likewise if an employee were injured while aiding in making up a train for the carriage of intra as well as interstate commerce he would in all probability come within the provisions of that Act. The Safety Appliance Acts specifically provide in section two that "it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car *used in moving interstate commerce* not equipped," etc. In an action brought under this statute the defense was interposed that the cars were not engaged in interstate commerce at the time but were standing in the yards. The court instructed the jury that "if the cars were cars engaged and being used in interstate commerce, it matters not whether they were being made up in the yard or were moving at the time out on the road, because the statute is intended to protect brakemen against the danger of such work, so far as it can protect them against such dangers, and it matters not whether interstate commerce cars were being made up to start out on the road or

(1) 117 Fed. 462.

(2) Gibson v. Janney, 15 Mass. 205.

(3) 196 U. S. 1.

whether they were actually moving along between the states at the time, so far as the purpose and intent of the statute is concerned. In fact, in the making up there is more necessity for the brakemen to be at their work, coupling the cars, bringing them together, than in the operation of the cars after they once start out."[4] Likewise in the case of C. M. & St. P. R. Co. v. Voelker,[5] in which it appeared that the cars had been left over night in the freight yards while *en route* to their destination, the court held that "there was evidence that the carriage or movement of the coal with which the car in question was loaded had not terminated, and that the coal was still actually in transit. . . The inference to be reasonably drawn from the evidence is that the car was then about to actively continue the journey toward the ultimate destination of the coal which it was carrying. Whether that was near by or remote is not material, because the shipment had originated in another state and was already impressed with the character of interstate traffic, which would follow it at least until the actual transit ceased. It may appear to be putting a strained construction on both the Safety Appliance Act and the act under consideration to hold that a car may be standing still and yet be engaged in interstate commerce. But it should be remembered, the acts are to be liberally construed with the idea of effecting the reforms contemplated. Moreover, as the court in one of the cases cited intimated, any other construction would practically nullify them, as the number of employees who are injured while trains are actually engaged in transporting commerce from one state to another is almost infinitesimal.

Does a common carrier which operates a railroad entirely within a single state and transports thereon articles of commerce shipped in a continuous passage from a place without that state to stations on its road, come within the provisions of the Employers' Liability Act? It has been directly held that such a railroad does come within the provisions of the Safety Appliance Act. "Importations into one state from another is the indispensable element, the test of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from an inception in one state to a prescribed destination in another, is a transaction of interstate commerce. Goods so carried never cease to be articles of interstate commerce from the time they are started upon their passage in one state until their delivery at their destination in the other is completed and they there mingle with and become a part of the great mass of property within the latter state. Their transportation never ceases to be a transaction of interstate commerce from its inception in one state until the delivery of the goods at their prescribed destinations in the other, and every one who participates in it, or who carries the goods through any part of their continuous passage, unavoidably engages in interstate commerce.[6] That case involved the provisions of the Safety Appliance Acts, but the argument of the court applies equally well to the act we are now investigating.

Would an employee, injured while working on an empty car, by reason of any of the defects described in the Employers' Liability Act, be permitted to recover for his injuries in case the empty car were part of a train which was engaged in carrying goods from one state to another? Arguing by analogy from the case of United States v. Chicago & N. W. R. Co.,[7] the answer should be in the affirmative. In that case the defendant company admitted that it had hauled a car from South Omaha, Neb., to Council Bluffs, Ia., but claimed that inasmuch as the particular car was empty at the time that it was not being used in interstate commerce. The court held otherwise, that the "mere hauling of the car itself was engaging in com-

(4) Crawford v. N. Y. R. Co., 10 Amer. Neg. Rep. 166.

(5) 129 Fed. 422.

(6) United States v. Col. & N. W. R. Co., 157. Fed. 321.

(7) 157 Fed. 616.

merce." The same contention was made by the defendant in the case of United States v. St. L., etc., R. Co.,[8] with the same result.

Where an injury is sustained by an employee who is not actually engaged on or about an interstate train, but who is engaged in facilitating the operation of such a train, as by repairing the track over which it passes, can he be brought within the provisions of the act under consideration? It is submitted that in most cases he can. In the case of Gilman v. Philadelphia,[9] the supreme court of the United States speaks thus: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose and to the extent necessary, of all the navigable waters of the United States, which are accessible from a state other than those in which they lie. For this purpose they are the property of the nation, and subject to all the requisite legislation by congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the state or otherwise; to remove such obstructions when they exist; and to provide by such sanctions as they may deem proper against the recurrence of the evil and for the punishment of the offenders." Consider this statement in connection with the decision of the same court in the case of In re Debs.[10] In the latter case it was held that an injunction might issue to prevent the interference with interstate commerce by, among the other means resorted to, the tearing up of the railroad track upon which the interstate commerce was carried. It was impliedly held immaterial that *intra*state commerce was also carried over that track. Accordingly, if a person can be enjoined from tearing up a railroad track because to allow it would result in an interference with interstate commerce, the converse of this proposition must equally be true, that a person engaged in laying down track over which interstate commerce is carried is engaged in promoting the work of interstate commerce. It is true that he is not, strictly, engaged in the actual movement of a train, but, as has been seen in the decisions construing the Safety Appliance Acts, that is not necessary. A section-hand engaged in laying track running from one state to another is as much engaged in interstate commerce as is a brakeman in coupling cars together for an interstate run.

We are, however, supported in our contention that a section-hand is engaged in interstate commerce by the analogous decisions rendered in several of our states construing state statutes giving relief to employees "engaged in the operation of a train" when injured by the negligence of a fellow-servant.[11] Although there is some difference of opinion,[12] the great weight of authority is to the effect that a section-hand is engaged in the operation of a train within the meaning of these statutes. Accordingly if a railroad track carries both inter and intrastate commerce a section-hand is engaged in the operation of both classes of such trains. Being "engaged in the operation of" an interstate train he is necessarily engaged in interstate commerce.

A closer question presents itself where an employee is engaged in laying new track over which interstate commerce is to be carried, and is injured by a fellow-servant while so employed. It seems impossible on principle to distinguish between this case and the case just treated. It is true that in the latter case the employee strictly might be held to be preparing for the transportation of interstate commerce rather than being actually engaged in such commerce. But if the federal power extends to removing obstructions in the way of interstate commerce, as has been seen is the case,[13] it certainly should have the power to

(8) 154 Fed. 516.

(9) 3 Wall. 713.

(10) 158 U. S. 565.

(11) See cases cited in Callahan v. St. Louis R. Co., 60 L. R. A. 250.

(12) Dunn v. Chicago, etc., R. Co., 6 L. R. A. (N. S.) 452.

(13) Gilman v. Philadelphia, 3 Wall. 713.

provide for the passage thereof, and to protect employees engaged in such work. As it has such power, and as it was the purpose of congress to protect employees engaged in interstate commerce, it is reasonable to conclude that the work in question is closely enough allied to interstate commerce to come within the provisions of the act.

These and similar questions are still open, and until decided, our courts will be forced to revert to first principles, and the legal profession to suspend for a time the eternal pursuit of cases on all fours.

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Spokane, Wash.

DEATH—PRESUMPTION FROM ABSENCE.

GRIMES v. MILLER.

Supreme Court of Missouri, Division No. 2, June 29, 1909.

Where an absent heir had no knowledge that his mother was dead, or that she left an estate, or of a former partition proceeding between the other heirs, disregarding his interest, and when he left the state he had no property liable to be affected by his absence, and his mother did not die until 12 years after his removal therefrom, the fact that he had been absent for more than 7 years, and in the meantime the other heirs had partitioned and sold the property to which he was entitled to an undivided interest to a bona fide purchaser, did not raise a conclusive presumption of his death, so as to preclude his recovering his interest on his return.

GANTT, P. J.: This is an action in two counts; the first being ejectment for possession of an undivided one-fourth of the northeast quarter of the northeast quarter of section 26, township 56, range 35, all in Buchanan county, Mo. The ouster was laid on the 19th of January, 1900. The second count was one for partition of the same land. It was admitted that the plaintiff was the son of Mahala Grimes, and that the said Mahala Grimes at the time of her death owned said real estate, and that, if plaintiff had any interest, it was a one-fourth interest; the only evidence offered by plaintiff being as to the value of the monthly rents and profits. It appeared from the evidence offered by the defendant that in 1896 a partition of the premises was had among all the heirs of Mahala Grimes, deceased, except the plaintiff herein, and he was not a party to said partition suit. In that action, the premises were divided in kind, and the defendant became the owner of the interest of the distributees and heirs by deeds from them about a year after that partition was made. Upon this state of facts, the circuit court rendered judgment for possession of the one-fourth interest in said property to which he was entitled as the son of Mahala Grimes. The cause then proceeded on the second count of the petition, and the same evidence and the same admissions were offered, together with the judgment in ejectment on the first count. And thereupon the court rendered a decree of partition adjudging plaintiff was entitled to one undivided one-fourth of the said premises and the defendant three-fourths. It was agreed, and the court so adjudged, that the lands could not be divided in kind without injury to the rights of the parties, and accordingly it was ordered sold, and the proceeds divided according to the rights of the parties as adjudged. From that judgment the defendants have appealed.

1. Section 593, Rev. St. 1899 (Ann. St. 1906, p. 619), provides that "the plaintiff may unite in the same petition several causes of action whether they be such as have heretofore been denominated legal or equitable or both, where they all arise out of: First, the same transaction or transactions connected with the same subject of action." The subject matter of this action is the land and the parties are the same and we can see no reason why the count in ejectment was not properly joined with the count in partition. Morrison v. Herrington, 120 Mo. 665, 25 S. W. 568; Lane v. Dowd, 172 Mo. 174, 72 S. W. 632; Scarborough v. Smith, 18 Kan. 399. Indeed, it seems too plain for discussion that, where an heir is denied recognition in the division of his ancestor's land, he has no other recourse except to bring his action in ejectment to compel a recognition of his right, and, if he succeeds therein, there is no reason why he should not proceed at once with his right to partition.

2. The real reason alleged by the defendants for the reversal of this judgment is that the plaintiff's family and the defendants who purchased from them believed that the plaintiff was dead at the time that the defendant acquired her interest in the lands in controversy. The evidence tended to show: That the plaintiff left Buchanan county 21 years before December, 1905, and had not been heard from until 1900 or 1901. That in 1896 his mother, Mahala Grimes, died the owner of the fee in this land, and in the same year a granddaught-

er of Mahala Grimes instituted a partition suit in the circuit court of Buchanan county against Cicero Smith and Homer Smith, alleging in her petition that she and the said Cicero and Homer Smith were the sole and only children and grandchildren of Mahala Grimes, deceased, and the said defendants Homer and Cicero Smith in their answers in said partition suit admitted the said allegations to be true, and thereupon the court found that the said Effie Thomas and the said Cicero and Homer Smith were the sole heirs at law of the said Mahala Grimes, deceased, and judgment in partition was rendered and said land divided among the said Effie Thomas and the said Cicero and Homer Smith, and thereafter the said Cicero and Homer Smith and Effie Thomas conveyed their several interests in said lands to the defendant Henry Miller, and the said Henry Miller then conveyed the same to Elgie Miller. Defendants invoke the presumption of death arising from the absence of the plaintiff from Buchanan county, and insist that the plaintiff, having created this legal presumption by his absence, is now precluded from claiming against an innocent person who purchased said land in good faith after a decree in partition between the remaining heirs at law. As to the partition suit between Effie Thomas and Cicero and Homer Smith, the plaintiff herein was no party thereto, and, of course, is not bound by the decree in that case. This is too plain for discussion. It is not pretended that there is any evidence of any inducement by the plaintiff to the defendants in this case to purchase the land, or that he did any act which would estop him from claiming his interest in this land, unless it is his absence from the state for more than seven years. In Scott v. McNeal, 154 U. S., loc. cit. 49, 14 Sup. Ct. 1114, 38 L. Ed. 896, the Supreme Court of the United States said: "The fact that a person has been absent and not heard from for seven years may create such a presumption of his death as if not overcome by other proof is such prima facie evidence of his death that the probate court may assume him to be dead and appoint an administrator of his estate, and that such an administrator may sue upon a debt due to him. But proof under proper pleadings even in a collateral suit that he was living at the time of the appointment of the administrator controls and overthrows the prima facie evidence of his death, and establishes that the court had no jurisdiction and the administrator no authority, and he is not bound either by the order appointing the administrator or by the judgment in any suit brought by the administrator against a third person because he was not a party to and had no notice of either." It was not shown that the plaintiff knew that his mother was dead or that she left an estate, or that he had any knowledge whatever of the former partition proceedings between the other heirs. When plaintiff left this state, he had no property here that was liable to be affected by his absence, and his mother did not die until 12 years after his removal from the state, and there is absolutely no evidence, as already said, that he had notice of his mother's death, or that she left an estate to which he was an heir. In the case of Scott v. McNeall, above referred to, the Supreme Court of the United States referred to the case of Lavin v. Emigrant Industrial Savings Bank (C. C.) 1 Fed. 641, 18 Blatchf. 1, in which it was held "that letters of administration upon the estate of a living man, issued by the surrogate after judicially determining that he was dead, were null and void as against him; that payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration valid against him would deprive him of his property without due process of law within the meaning of the fourteenth amendment of the Constitution of the United States. This court concurs in the proposition there announced "that it is not competent for a state by a law declaring a judicial determination that a man is dead made in his absence and without any notice to or process issued against him conclusive for the purpose of divesting him of his property and vesting it in an administrator for the benefit of his creditors and next of kin either absolutely or in favor of those who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever as against him, although it is done by process of law against other people, his next of kin to whom notice is given. Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy which has the immediate effect of divesting him of his property is a direct violation of this constitutional guaranty.'" So in this partition suit between plaintiff's brothers and niece he was not made a party to the suit, and, of course, his rights were unaffected thereby. We have given due consideration to the argument of defendants' counsel that, if this case is affirmed, they will have paid their money for a portion of this land and will lose it, but this is no answer to the claim of the plaintiff that this is his property, and that he has done no act and been guilty of no representation or inducement to mislead the defendants. He is not responsible for the fact that his brothers and niece made repre-

sentations in their suit for partition to the effect that they were the only heirs at law of Mahala Grimes. To deny him his recovery in this case would be to deprive him of his property without due process of law, and leave him absolutely without remedy for the loss of his estate. On the other hand, the defendants had it within their power to require their grantors to give them warranty deeds and a perfect abstract of title before investing their money in this land.

The equity of the case coincides, in our opinion, with the plain law of the case, and that is that the circuit court properly decreed this one-fourth of this land to belong to the plaintiff, and its judgment is therefore affirmed.

NOTE—*Death as an Adjudicated Fact and the Conclusiveness of the Adjudication.*—The principal case shows, that real estate was partitioned in a proceeding prescribed by statute and that a bona fide purchaser deraigning his title through a decree regularly rendered is, now that it has been ascertained that one of the heirs was alive at the time of its rendition, though found to be dead, held not to have gotten a valid title to that heir's part in the property sold by the decree. At bottom this conclusion rests upon the fact that the title to real estate descends to the heir, while personal property vests in the administrator. Thus in Mutual Benefit L. Ins. Co. v. Tisdale, 91 U. S. 238, it was said by Hunt, Justice, that "In an action brought by an executor or administrator touching the collection and settlement of the estate of deceased, they are conclusive evidence of his right to sue for and receive whatever was due to the deceased, and it is argued that this is so, not because there is an adjudication of death, but merely an adjudication by the Probate Court that there was an estate to be administered. "Shall ——— receive letters of administration was the *res;* and upon that only has there been adjudication." Such adjudication within its scope was held to be wholly unimpeachable, but where the letters were offered in evidence outside of that scope they were held inadmissible. The court thus reasoned: "This suit is by the plaintiff as an individual, to recover a debt alleged to be due her as an individual. It is a distinct and separate proceeding, in which the question of the death of the husband has never been passed upon, that fact must be established upon common-law principles." This court also says: "The chief ground of argument to admit letters testamentary as evidence of the death of the party is, that the order of the Probate Court issuing them is an order or judgment *in rem.* But a judgment *in rem* is not *prima facie* evidence; it is conclusive of the point adjudicated, unless impeached for fraud."

We have dwelt thus long on this case so as to make clear the deduction that collection by an administrator must necessarily be satisfaction of the debt collected; sale by him must also, when duly made, transfer an unimpeachable title and distribution operate as a full discharge of his liability to account. All this because adjudication of the question involved, viz.: the grant of letters of administration is conclusive against the world, because it is a judgment *in rem.* Of course, it may well be held, that a distributee could not hold what he had received after discovery that the alleged deceased was not in fact dead, as his only claim is that he stands in the shoes of the alleged decedent, who was not a decedent except for stated purposes.

Finding then that real estate descends to the heirs, yet there is a title *sub modo* in the administrator for payment of debts, and if it were sold for any such reason it might be asserted the purchaser would get as good a title as a purchaser of personalty at administrator's sale. The Tisdale case, at all events, presents the true reason why in almost every action not brought by an administrator or executor the question of death may be raised, e. g., in suits on insurance policies. Policemen's Ben. Ass'n. v. Ryce, 213 Ill. 9, 72 N. E. 764, 104 Am. St. Rep. 190; Heagany v. National Union, 143 Mich. 186, 106 N. W. 700. But we do not see why third parties should be allowed to contest the fact of death in suits by administrators, etc. Tisdale v. Conn. Mut. L. Ins. Co., 26 Iowa, 170, 96 Am. Dec. 136; Seibert v. True, 8 Kan. 52; Pick v. Strong, 26 Minn. 303, 3 N. W. 697; Brown v. Elwell, 17 Wash. 442, 49 Pac. 1068. In effect the judgment *in rem* gives the legal representative a command to collect and this allows his authority to be questioned at every step. This certainly would not be allowed as to ordinary indebtedness, even if it should be permitted, as say in the instance of suit on an insurance policy, where the condition of the accrual of the indebtedness is death of the assured.

But here we have a distribution by a court of competent jurisdiction upon a finding of death which seems inconclusive, notwithstanding the finding of death is jurisdictional in the same way as in the grant of letters of administration. The New York Court of Appeals views, or seems to view, the matter just as in the principal case. Thus, in Terry v. Sampson, 112 N. Y. 415, 20 N. E. 387, a purchaser of premises at partition sale refused to complete his purchase because of the absent heir, whom the court adjudged to be dead. The court compelled him, but not because this adjudication bound, if in fact alive, but because "the alleged outstanding right is a very improbable and remote contingency, which, according to ordinary experience, has no probable basis." Then some observations are made on the theory that such an exercise of authority by the court "is to be carefully and guardedly exercised, and only where the case is free from reasonable doubt." Maine court seems to differ with Federal Supreme Court in the principle of conclusiveness, at least, where a guardian was appointed for minor children of an alleged decedent, a third person was held not entitled to object to the guardian's deed in a chain of title "in the absence of any evidence to show their father was alive." Burleigh v. Mullen, 95 Me. 423, 50 Atl. 47.

But here is the question that presses, if we admit, as it seems to us it is idle to dispute, that an administrator duly appointed may by sale, in due course of administration, transfer an absolutely valid title, why should not a partition sale effect the same result? If the property is divided in kind, should not the decree be unimpeachable by any third person, because the pro-

ceeding being *in rem* the judgment is one *in rem?* If it is this, does it not look farcical that the parcel cannot be conveyed to an innocent purchaser against the alleged decedent, who was not really dead? But, if this is true, ought not the alternative method of conveyance to a purchaser be equally effective? Why should this technicality of personal property belonging to administrator for all purposes, and realty, not *sub modo*, make this difference to third persons whom the law invites to come in? There would be no more an invasion of one's constitutional rights to make real estate thus transferable than there is in making any property subject to attachment on service by publication. It is the control the state has on property because of *situs*. If one wishes to discover how rare is authority on the question suggested by the principal case, let him examine any number of cases where presumption of death has been considered. This goes to show, at least, that the application of the principle has rarely worked injustice in any direction. C.

JETSAM AND FLOTSAM.

PRACTICE OF LAW BY CORPORATIONS.

The New York Law.—New York is leading the way to a valuable reform in the interest not only of the legal profession, but of the people themselves. The reform is a recent law just put into force by the signature of Gov. Hughes, prohibiting corporations from practicing law. This law provides that no corporation "shall be organized or created for the purpose of conducting any branch of the practice of law or of retaining or employing an attorney or attorneys to furnish legal advice, draw legal papers, or perform legal services of any kind or description, either directly for the person, persons or corporation for whose use such services are rendered or for the corporation retaining such attorney in compliance with any contract of employment of the corporation or of the attorney made by the corporation with any other person, persons or corporation."

Trust Companies as "Lawyers."—This New York statute will be a severe blow to those trust companies who are so given to advertising their legal services so gratuitously and in a very unethical manner. It has always been to us an unfathomable problem why reputable lawyers could sell their services to a corporation for a salary and then not become besmirched by the unethical methods of the corporation in soliciting business.

Trust Companies as Executors and Trustees.—It has not occurred to every lawyer, possibly, that there is quite a difference between the right of a corporation to act as executor and to act as trustee. In the former case, they act by sufferance, in the latter, by inherent right. That is, at common law, no corporation could act as executor, but there was never any question of their ability to hold property to the use of another. To act as an executor of an estate, a corporation must be expressly authorized by statute. But, even to-day, the rule in England still recognizes the essential personal character of an executor's duties. In the case of In re Goods of Hunt, L. R. (1896), P. D. 288, the court ordered the general manager of a trust company, chartered to act as executor, trustee, etc., which had been named as executor in a will, to be appointed administrator cum testamento annexo with the trust company as surety, thus preserving the personal aspect of this relation.

Extravagant Exploitation of the Corporation.—America is said to be the land of extravagance. We are prone to push a good thing too far. One of those "things" just now is the corporation. A good thing, a splendid device for certain purposes,—it has its limitations. One of those limitations is the limitations of personality. Wherever it essays to thrust its cold, inanimate and uncanny personality into those relations of life where flesh and blood alone should act, it has gone too far. We therefore believe that the line of New York authorities which hold that a corporation cannot practice medicine or dentistry because such relation is a personal relation, are founded upon correct principles of law. Only persons, flesh and blood, can be examined and can qualify for such professions. People v. Woodbury Institute, 192 N. Y. 454.

Corporations as Lawyers.—The corporation lawyer is all right, although sometimes a "thorn in the flesh," but the corporation as a "lawyer" is intolerable. Courts have already held that a layman, not licensed to practice law, cannot enjoy the emoluments of such practice by contracting for a division of fees with attorneys on all cases which he brings to them. Why, then, should a corporation, not authorized by law, be permitted to do what an individual cannot do. Could a layman employ a firm of attorneys on a salary to transact all the business he would turn over them and then proceed by means ethical and unethical, to secure legal business through which he reaps a profit? Of course not. Why then should a corporation enjoy greater privileges? We believe this New York legislation is but declaratory of the rule at common law, but necessary in view of the laxity of public opinion on such questions.—A. H. R.

MANSLAUGHTER BY AUTOMOBILE.

The recent conviction of the chauffeur, Darragh, before Judge Mulqueen, in the Court of General Sessions of the City of New York, and the imposition upon him of a severe sentence were strongly approved by public sentiment. It was generally recognized, in comments by the press, that this prosecution would have a salutary effect as an example. In that case, as we remember, there were certain aggravated features. It was claimed on the part of the prosecution that death might not have resulted if the chauffeur had stopped immediately, instead of dragging the person who was struck for some distance in an endeavor to escape arrest and detection. It was only natural and proper if the jury found that the defendant had been guilty of such conduct to convict him of manslaughter and subject him to very serious punishment.

The moral effect of the Darragh case will be emphasized by the recent decision of the Third Appellate Division of the New York Supreme Court, in People v. Scanlon and Albro (May, 1909, 117 N. Y. Supp. 55), affirming the conviction of a chauffeur for manslaughter. Although the car was not stopped and no attempt was made to render aid, there was no suggestion that the injury to the victim was aggravated by the chauffeur's conduct after the collision. It appeared that "upon June 23,

1907, one Jared Francisco was driving toward the village of Arkville, in the town of Middletown, in the County of Delaware. He was driving a single horse attached to a buggy in which he was riding. He had with him a boy by the name of Harry Gordon. When within about one mile of this village the right wheel of the buggy collapsed. Both Francisco and the boy were thrown, and the boy fell at the feet of the horse. By reason of injuries which he received from the kicking of the horse he died upon the succeeding day. At the time that this buggy wheel collapsed an automobile was passing, and it is claimed that the buggy was struck by the automobile and thereby caused to break down. These defendants have been charged by the jury with the negligent running of this automobile, whereby the collision was caused, and the death of the boy. The defendant Albro was the owner of the automobile, and was sitting upon the left forward seat. The defendant Scanlon was the chauffeur, and was driving the car. From this judgment of conviction these defendants have here appealed."

The appellate division reverses the conviction of the owner of the car upon the ground that he was not running the machine and that "in the few seconds of time which elapsed after he might have seen that a collision was to occur he could not give directions which would avoid the collision. The whole thing was, as it were, instantaneous, in the control of the chauffeur, but in no way in the control of the owner of the car. He had not the wheel in hand. It is true that the chauffeur was under the control of the owner, but that means the general control. He might give general directions. It would be impossible, however, to give specific directions as to the manner of driving upon each separate piece of road over which they were passing. If it were the chauffeur's habit to run so close to other cars as to cause danger, and Albro knew of it without correcting it, he might be held liable for this negligence; but there is not one word of evidence to the effect that this was the habit of the chauffeur, and Albro's conviction must rest upon his failure within a second of time to give directions, which could not even be comprehended and acted upon, if given, in time to have avoided the accident. It is not contended that for the purposes of a criminal prosecution the negligence of Scanlon could be attributed to the defendant Albro."

The conviction of the chauffeur is, however, affirmed, the court saying in part: "The defendants' main contention is that the verdict is unsupported by the evidence. Their contention is twofold: First, that the proof does not justify beyond a reasonable doubt the inference that the machine struck the carriage and thereby caused Gordon's death; second, that it is not proven beyond a reasonable doubt that Francisco's wagon was struck by the defendant's car. Francisco had turned out of the road to the right. It was the left hind wheel which is claimed to have been struck. That wheel was not broken. The right hind wheel, however, was dished; that is, the hub was apparently pushed through the wheel, which caused the wagon to drop down and throw out its occupants. Francisco himself does not swear positively that the buggy was struck. There is evidence, however, that the buggy had been newly painted, and that upon the left hind wheel there were marks, and also upon the hind part of the buggy box. There is further evidence that the ground at that place showed that the buggy had been crowded over five or six inches, and that the right wheel had scraped up the turf where it had been pushed over before it collapsed. It is true that, after Francisco had partly turned out, the horse was leading back into the beaten track, and was pulled suddenly out to the right. It is difficult to see, however, how that could have pulled the hind wheels in such a way as to cause them to scrape the sod for five or six inches as though pushed out of their place. Witnesses swear as to the tracks of these wheels and as to automobile tracks—some of them that they came within two or three inches, and some of the witnesses that they practically came together; that the automobile tracks showed no digression from the main traveled highway and indicated no attempt on the part of the driver of the car to turn out in the least. In view of this evidence it might well have been found by the jury that the carriage was struck by the automobile and pushed over through the sod until it caused the right hind wheel to collapse. The evidence does not make it clear whether or not the buggy was actually thrown over onto the sod and was afterwards tipped back, or whether it simply dropped to the ground after the wheel was crushed. The boy was apparently thrown out over the dashboard. It would seem as though there must have been something more than the mere collapsing of the buggy. Possibly the jerking of the horse was also an element which contributed to the accident; but that would not relieve the defendants, if the defendants' negligence were the proximate and efficient cause thereof. The inference from the whole case, which seems to me irresistible, is that this buggy had gotten just beyond the beaten track of the road, and that the jerking of this horse back out of the road pulled the buggy somewhat back into the beaten track, and that in this way the collision was caused. This inference would explain why the boy was thrown forward over the dashboard and toward the forward part of the horse. The defendant Scanlon sought to make a close pass, without diverging in any way from the beaten track of the road. It is this reckless driving which is the cause of many accidents, and which ought to disqualify any chauffeur who practices it. With a heavy machine, weighing from 3,000 to 4,000 pounds, going at the rate of twenty-five miles an hour, it is indefensible negligence to attempt to pass a buggy within a few inches. Such driving cannot be too severely condemned."

This case, as much as, if not even more than, the Darragh case, betokens a disposition on the part of jurors as well as courts to enforce the law. There has formerly been much difficulty in procuring criminal convictions for homicide caused by negligence without special and aggravated features, such as were alleged to have existed in the Darragh case. The running of automobiles at illegal rates of speed with frequently resulting injury to person and property and loss of life has become such a serious and notorious evil that public sentiment now demand criminal punishment of careless chauffeurs. The opinion in the Scanlon case is well considered and justifies the affirmance of the conviction. It is believed that dissemination of information of this case would exert a strong influence for public protection.—New York Law Journal.

CORRESPONDENCE.

"BROTHERLY" TREATMENT AMONG JUDGES

Judge John A. Raker, of Alturas, Cal., has received a communication from a "fellow laborer on the bench," asking for "'brotherly treatment," which raises an entirely new question of judicial ethics. Through the courtesy of one of our correspondents we have received an exact copy of this remarkable letter, which we reproduce entire, except as to location and signature:

————, Ark., Aug. 1, 1909.

To the Hon. Prob. Judge of Modoc Co., Cal.:

Sir:

if your onner pleas do the business rite for me? I hav served as J. P. for 22 years and 4 yrs. as Sociate Judge and 2 years as county treasurer, and I hav traveled east and been to the dark corner, and pleas treat me as a brother in the estate of ————. As an official, I remain as ever, your friend. S——.

LIEN CREDITORS OF A BUILDING CONTRACTOR.

Editor Central Law Journal:

It seems to me, after a careful examination of the decision of the Supreme Court of Georgia in the case of Pike Bros. Lumber Company v. Mitchell et al., decided June 15, 1909, that your criticism thereof in your issue of August 6 is wholly unwarranted.

In the first place there is really only one point decided by the court in that case, to-wit. That in order to foreclose a materialman's lien against the owner of real estate on account of material furnished to a contractor, it is necessary that the contractor should be made a party defendant with the owner of the property or that the lien claimant should have a judgment against the contractor at the time of the filing of the suit, and that inasmuch as the plaintiff had neither a judgment against the contractor nor had made him a party defendant in the foreclosure proceedings, the case could not proceed. This is all there is in the case. The court did say that the bankruptcy of the contractor was no excuse for not making him a party, or rather that the fact that the contractor should not be made a party on account of his bankruptcy was no excuse, but at last the real ruling was that stated at first.

The court cites in its opinion, among other cases, Clayton v. Farrar Lumber Company, 119 Ga. 37, in support of its ruling, which is the only case which touches the point under discussion. If you will take the trouble to examine the opinion in this case, you will find a number of cases cited to support the ruling there made, beginning with a case in the 73 Georgia Reports, and among others, you will find the case of Castleberry v. Johnson, 92 Georgia, p. 499, which is cited by you in your note. You say that the principal debtor in that case was served by publication. Evidently you have not read the case. I have. Your statement is incorrect. The principal debtor (the contractor) was not served by publication in that case. He was not served at all. He was not even made a party. For this very reason the lower court sustained a general demurrer to the petition, and this ruling was upheld by the Supreme Court. That was all there was in the case and the only point ruled.

Failure to make the contractor a party does not affect the lien. It simply prevents you from obtaining judgment of foreclosure for lack of proper parties. Bankruptcy of the contractor does not affect the lien. It only puts you where you cannot foreclose for want of proper parties defendant. The remedy is destroyed, not the lien, by bankruptcy. Liens are creatures of the statute and hence strictly construed.

Lastly, the court has adhered to the rule already made in Georgia, which is good enough for,

Yours truly,

Atlanta, Ga. W. H. TERRELL.

STILL ANOTHER LETTER ON THE SAME SUBJECT.

Editor Central Law Journal:

In your note, published in the issue of August 6, 1909, of your valuable publication, criticising the opinion of the Supreme Court of Georgia in the case of Pike Bros. Lumber Company v. Mitchell, decided June 15, 1909, your conclusion is based on the Mechanics' Lien Law of Georgia, as it existed prior to the amendatory acts of the Legislature of 1897 and 1899, which acts repealed, among other clauses of the law, that relating to written notice formerly required to be given to the owner of the real estate improved. As the law now is there is no provision for written notice of the claim of lien to the owner of the realty. And as a matter of fact there is no effort to show that the owner, Mitchell, knew of the alleged claim, or had any notice thereof prior to the bankruptcy of the contractor.

You state that it seems "that the Georgia court is both inconsistent with itself and not regardful of the express terms of the Georgia statute as to the attaching of lien by giving of statutory notice." And again, "If he (contractor) has been fully paid, despite written notice given the owner, whose fault is it?" "If no written notice was given, no subcontractor has any standing in court." As stated above, that portion of the former statute, quoted by you, was repealed by the Acts of 1899, and since there was no provision for written notice, and none given, you are correct in the statement that the subcontractor the materialman "has no standing in court," which was the conclusion reached both by the trial court and the Supreme Court of Georgia.

The Supreme Court of Georgia would have been inconsistent to have decided otherwise, since in an unbroken line of decisions, this court has held that it is necessary to secure a personal judgment against the contractor before the lien can be enforced. The case of Castleberry v. Johnson, 92 Ga. 499, was rendered under the law as it existed prior to the amendments above referred to, and provided for the written notice. And the facts of that case further show that this notice was served on the owner of the real estate before the contractor absconded, and while the owner was indebted to the contractor more than the amount of the materialman's claim of lien; and thus being put on notice, and in a position to protect himself, the owner should have done so. In that case the court held that, under the law then existing, and the facts of the case, that a judgment could be had against both, and service had by publication.

You can readily see that there could be no equitable claim against the owner in the case discussed here for a debt due to a materialman or mechanic, where there is no privity of contract between the materialman and the

owner, and no notice of the existence of the claim on the part of the owner.

Yours respectfully,

A. H. THOMPSON.

La Grange, Ga.

NOTE.—We are glad to publish the above correspondence, as what is said is of more than local interest, and this note is written with the view of saying something along the line of general interest rather than from the Georgia standpoint.

Our correspondents do not seem in harmony in regard to the Castleberry case, but, if we were misled there, our explanation lies in the fact that we fell a victim in wrongly using the syllabus decision, which is the Georgia practice. Our general readers are advised that this practice, as we understand it, is that the court agrees on the legal proposition in the syllabus and its form of expression. In some of the cases the legal proposition is aided by a statement of facts. In others it is sufficient unto itself without such aider. In some cases one or more of the judges write opinions, but to the syllabus one must look for the decision. We believe this a most excellent plan, as thereby misleading dicta are less apt to cloud the course of precedent. But we think it is here demonstrated that complete escape from those wills-o'-the-wisp, called obiter dicta, cannot be guaranteed under any system. Thus we found as a part of the short syllabus decision in the Castleberry case the following: "If the contractor absconded and left the state so that he could not be served in the usual manner, the materialman might foreclose his lien by resorting to equitable proceedings against the owner and contractor jointly, serving the latter by publication."

In the case annotated by us the following is the syllabus decision and in that case there is no statement of facts per curiam, but an opinion by one of the judges: "In order to foreclose a materialman's lien for material furnished a contractor to be used in improving the property of another, it is necessary that the materialman have judgment against the contractor in a previous action, or the contractor must be sued concurrently in the foreclosure proceedings with the owner of the property improved. If the contractor be adjudged a bankrupt, so that no judgment in personam can be had against him in an action at law, his immunity from liability to a personal judgment will not give the materialman a right to foreclose his lien in equity against the property improved."

Our correspondents seem to regard the first sentence as containing the point involved, while we look upon that as merely the restatement of a well-established principle by way of an introduction to the second sentence, which disposes of the real question at issue. This suit is shown by the opinion to have been brought against both owner and bankrupt contractor, but that was no necessary part of the syllabus, as the case was decided. If plaintiff's contention had been sustained, both should have been sued concurrently.

One of our correspondents says amendment has done away with written notice, but this amendment was more in favor of subcontractors than before, for the amendment said their lien should "attach upon the real estate improved as against such true owner * * * unless such true owner shows that such lien has been waived in writing or produces the sworn statement of the contractor * * * that the agreed price or reasonable value thereof has been paid." That seems to us to put the subcontractor in better position than before, except that false swearing by the contractor may defraud him of his lien. Presumptively his lien exists, if his debt is unpaid, just as that of the contractor himself, and this presumption is displaced in one of two ways.

We believe that there is no state in the union where the lien can be enforced without the principal debtor being sued, but our complaint is, that the Georgia court is in error in refusing to permit an exception to this rule on account of bankruptcy, when that statute of "a different but paramount sovereignty" intended such exception to be recognized, and when the federal supreme court, as our note shows, indicated a practicable way to do this.

But on the question of privity, or rather want of privity, as argued by the judge who wrote an opinion in the case, we wish to say we disagree with his argument. The lien statute of Georgia embraces in one paragraph mechanics materialman, laborers and contractors, and says they "shall each have a special lien," etc., and while subcontractors were formerly required to preserve that lien by the giving of written notice, the statute is amended so as to make that unnecessary. Instead of the true owner being required, as formerly, to retain from the contractor in pursuance to notice, now he must do so until the subcontractor's lien has been waived in writng, or the contractor makes a sworn statement that the property is clear.

There seems to us to be statutory privity—at least such an approach thereto as to justify a court of equity in preserving what the bankruptcy statute said should be preserved, instead of applying a condition created by that statute to its destruction.

If, as one of our correspondents thinks, an absconding contractor could not defeat the lien under the rule of notice, far less ought he to be able to do this where the attached lien needs no notice to preserve it. We do not think the underlying principle discussed in our note has been affected by this change in legislation. The owner remains still, substantially, a garnishee from the time the materialman's lien attached.

That the bankruptcy statute does not require that a judgment prior to bankruptcy shall establish even a lien obtained through judicial proceedings, is shown by the fact that attachment liens and judgment liens are put upon the same footing. See Bankruptcy Stat., Sec. 67c and f.—The Editor.

HUMOR OF THE LAW.

Robert Smith, brother of Sydney Smith, and an ex-Advocate-General, on one occasion engaged in an argument with a physician over the relative merits of their respective professions.

"I don't say that all lawyers are crooks," said the doctor, "but you'll have to admit that your profession doesn't make angels of men."

"No," retorted Smith, "you doctors certainly have the best of us there."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

1. **Accident Insurance**—Notice of Sickness.—A failure to give notice of sickness within the time required will be excused where the sickness of insured makes it impossible to give the notice, and he gives it within a reasonable time after he is able to do so.—North American Accident Ins. Co. v. Watson, Ga., 64 S. E. 693.

2. **Alteration of Instruments**—Mortgages.—In replevin by a chattel mortgagee against the purchaser of the mortgaged property, with notice, that the note secured by the mortgage was altered by decreasing it was no defense.—Van Eps v. Newald, Wis., 120 N. W. 853.

3. **Assignments**—Contracts Assignable.—A contract for the construction and equipment of a canning factory held not assignable without the consent of the parties thereto.—Johnson v. Vickers, Wis., 120 N. W. 837.

4. **Assumpsit, Action of**—Common Counts.—Assumpsit will not lie to recover the value of undelivered goods, part of a larger quantity all sold together for a lump sum.—Applebaum v. Goldman, Mich., 121 N. W. 288.

5. **Attorney and Client**—Attorney's Lien.—An attorney's lien was not waived by his consenting that his client should collect the money on the verdict and then pay him.—In re Nethaway, Minn., 121 N. W. 418.

6. **Bankruptcy**—Action Against Trustee.—An attempt by a trustee in bankruptcy in an action brought against him in a state ocurt to have an order dismissing a garnishment affecting the property in question set aside held to be a waiver of objections to the jurisdiction of the state court.—Gardner v. Planters' Nat. Bank of Honey Grove, Tex., 118 S. W. 1146.

7.——Filing of Petition.—The filing of a petition in bankruptcy is notice of the proceedings, and one who subsequently seizes property of the bankrupt is liable therefor.—Dittemore v. Cable Milling Co., Idaho, 101 Pac. 593.

8. **Bills and Notes**—Bona Fide Purchasers.—Mere negligence not amounting to actual mala fides is insufficient to deprive a holder of negotiable paper for value of the rights of a bona fide holder.—Armstrong v. Stearns, Mich., 121 N. W. 312.

9.——Bona Fide Purchasers.—Only bad faith will defeat the title of an indorsee of commercial paper taken for value before maturity, and without knowledge of any defense thereto.—Kavanaugh v. Bank of America, Ill., 87 N. E. 171.

10.——Illegal Consideration.—A settlement of bastardy proceedings held a consideration for a note; and it is no defense that the guardian of the infant made an unlawful agreement not to prosecute for rape, unless the infant knowingly participated therein.—Griffin v. Chriswisser, Neb., 120 N. W. 909.

11.——Consideration.—A note executed by a legatee to a contestant to procure the withdrawal of the contest of the will held based on a sufficient consideration.—Wright v. Bayless, Ky., 118 S. W. 918.

12.——Nature of Liability.—One indorsing a note may show by parol that he signed as surety and not as principal, though the indorsement recited that he signed as principal and not as surety.—Spencer v. Alki Point Transp. Co., Wash., 101 Pac. 509.

13.——Right to Sue.—A holder of a negotiable note payable to bearer, or payable to order and indorsed in blank, can sue on it in his own name; nor need he prove that he owns the note, or, if he does not, that he has the consent of the true owner to sue on it in his own name.—Lowell v. Bickford, Mass., 87 N. E. 1.

14. **Brokers**—Right to Commission.—Where a contract has been made between the owner of land and the broker's customer, the broker's right to commissions is not dependent on the purchaser's ability to pay for the land.—Hamburger & Dreyling v. Thomas, Tex., 118 S. W. 770.

15. **Carriers**—Carriage of Goods.—As between a carrier and the owner of freight, the negligence or misconduct of a third person resulting in loss to the freight does not excuse the carrier.—Stockton Lumber Co. v. California Navigation & Improvement Co., Cal., 101 Pac. 541.

16.——Carriage of Live Stock.—A contract by a shipper of live stock held not to require him to make such careful inspection of cars and yards as would reveal latent defects.—Buck v. Oregon R. & Navigation Co., Wash., 101 Pac. 491.

17.——Damages.—A railroad company destroying buildings by fire cannot reduce the owner's recovery therefor by showing that he received insurance.—Erhart v. Wabash Ry. Co., Mo., 118 S. W. 657.

18.——Injury to Licensee.—One who was injured while alighting from a moving train, after assisting his sister on board, held to be on the train as an implied licensee, so that the company would be bound to exercise ordinary care to protect him from injury and would be liable for its failure to do so.—Huchingson v. Texas Cent. R. Co., Tex., 118 S. W. 1123.

19.——Injury to Person Accompanying Passenger.—A carrier held bound to exercise ordinary care for safety of a person on its premises, by its implied invitation, to accompany a

passenger to a train.—Fortune v. Southern Ry. Co., N. C., 64 S. E. 759.

20.——Liability of Connecting Carriers.—In the absence of special contract or the existence of a relation of partnership or agency between an initial and a connecting carrier, the connecting carrier is liable only for loss or damage occurring on its own line.—Southern Express Co. v. Saks, Ala., 49 So. 392.

21.——Who Are Passengers.—Employee of quarry company while being transported to and from work held a passenger of the railroad company over whose track the train was operated by the quarry company.—Gregory v. Georgia Granite R. Co., Ga., 64 S. E. 686.

22. **Champerty and Maintenance**—Contracts Avoided.—If a contract between a litigant and a person who agreed for a percentage of the amount recovered to hire attorneys and pay expenses of the suit was champertous, it would be void only as between the parties thereto, and would not affect the obligation of the adverse party to the suit to the contracting litigant.—Foley v. Grand Rapids & I. Ry. Co., Mich., 121 N. W. 257.

23. **Chattel Mortgages**—Lien.—Holder of note secured by chattel mortgage does not lose his mortgage security by attempting to collect the note by law.—Kansas City Live Stock Commission Co. v. Bank of Hamlin, Kan., 101 Pac. 617.

24.——Lien of Landlord.—The lien of a landlord for rent due held superior to a mortgage executed by the tenant.—Gillespie v. McCleskey, Ala., 49 So. 362.

25. **Contracts**—Void as Against Public Policy.—A contract for the services of an attorney to use his personal influence to secure a contract from the county for the erection of bridges is void as against public policy.—Flynn v. Bank of Mineral Wells, Tex., 118 S. W. 848.

26.——Consideration.—A comparatively slight degree of mental incapacity will justify a court in setting aside a contract for which no valuable consideration has been received.—Weeke v. Wortmann, Neb., 120 N. W. 933.

27. **Corporations**—Assets in Hands of Stockholders.—Assets of a corporation in the hands of stockholders are regarded in equity as the property of the corporation and subject to claims of creditors.—Standard Distilling & Distributing Co. v. Jones & Adams Co., Ill., 88 N. E. 236.

28.——Estoppel.—If a suretyship contract was made by a corporation for its own benefit and it received the benefits thereof, it may be estopped from denying that it was ultra vires.—Spencer v. Alki Point Transp. Co., Wash., 101 Pac. 509.

29.——Right to Come Into State.—A state may allow a foreign corporation to transact business within its limits on such terms as it may impose, or exclude it entirely.—Southern Ry. Co. v. Greene, Ala., 49 So. 404.

30. **Counties**—Liability for County Money.—A county officer with public money in his hands is not relieved of his obligation to repay it to the proper authorities by either mistake, fraud or negligence of the board of commissioners in making settlements with him.—Heritage v. State, Ind., 88 N. E. 114.

31. **Covenants**—Against Incumbrances.—A covenant against incumbrance held not to run with the land, unless coupled with the covenant for quiet enjoyment.—Tuskegee Land & Security Co. v. Birmingham Realty Co., Ala., 49 So. 378.

32. **Criminal Evidence**—Other Offenses.—Parol evidence of the contents of the record of a conviction is inadmissible.—People v. Burke, Mich., 112 N. W. 282.

33. **Curtesy**—Divorce from Bed and Board.—A decree from bed and board with perpetual separation, under Code 1899, c. 64, sec. 12 (Code 1906, sec. 2927), held not to bar curtesy of husband in lands belonging to wife at time of decree.—Hartigan v. Hartigan, W. Va., 64 S. E. 726.

34. **Damages**—Pain and Suffering.—There is no fixed rule for the measure of damages occasioned by pain, and the matter is peculiarly for the jury.—Bayard v. City of Franklin, Neb., 120 N. W. 914.

35.——Value of Services of Unskilled Nurses.—The value of services of the members of the family of an injured person rendered in the usual way of unskilled nurses held a matter of common knowledge, which a jury may determine as a basis for assessing damages without proof thereof.—Scurlock v. City of Boone, Iowa, 121 N. W. 369.

36. **Dedication**—Acts of Life Tenant.—Any acts of a life tenant of land respecting a dedication thereof would not affect the remaindermen, as the life tenant could not dedicate any interest in the fee.—McKinney v. Duncan, Tenn., 118 S. W. 683.

37.——What Constitutes.—The assent and intent of the owner to appropriate land to a public use is sufficient to constitute a dedication; no writing being necessary.—Menczer v. Poage, Tex., 118 S. W. 863.

38. **Deeds**—Consideration.—A consideration is not necessary to support a deed or conveyance that is fully executed and delivered.—Robertson v. Hefley, Tex., 118 S. W. 1159.

39.——Delivery.—The law makes stronger presumptions in favor of the delivery of a deed in the case of voluntary settlements than in an ordinary case of bargain and sale; but, if the grantees are of age, the presumption of delivery in their favor does not obtain to the extent that it would if they were minors.—Ackman v. Potter, Ill., 88 N. E. 231.

40.——Fraudulent Representations.—Fraudulent representations of a third person will not warrant rescission of a deed and recovery of the purchase money paid, unless they were authorized, or vendor knew or approved thereof.—Travis v. Taylor, Ky., 118 S. W. 988.

41.——Mental Capacity to Execute.—To sustain a deed challenged for want of mental capacity as having been executed in a lucid interval, held, that the proof must show the capacity necessary to the disposition and management of affairs.—Towner v. Towner, W. Va., 64 S. E. 732.

42. **Electricity**—Violation of Ordinance.—A violation by a street railway company of the ordinance granting the franchise and prescribing the manner of guarding its wires held prima facia evidence of negligence.—Conrad v. Springfield Consol. Ry. Co., Ill., 88 N. E. 180.

43. **Equity**—Laches.—Moral as well as legal considerations will be construed in determining whether complainant has abandoned his cause of action.—Depue v. Miller, W. Va., 64 S. E. 740.

44. **Estoppel**—Claims Inconsistent With Prior

Claims.—Where a party gives a reason for his conduct, he cannot after litigation commenced change his reason, and put his conduct upon a different ground.—Powers v. Bohuslav, Neb., 120 N. W. 942.

45.——Prejudice to Person Setting Up Estoppel.—That a beneficiary applied for divorce from insured held not to estop her as against order issuing benefit certificate from asserting that insured died before that time.—Butler v. Supreme Court of I. O. F., Wash., 101 Pac. 481.

46.——Recital in Contract.—Recital in contract that does not amount to a precise affirmation of fact will not estop the party to deny the fact.—Nashville C. & St. L. Ry. v. Proctor, Ala., 49 So. 377.

47. **Evidence**—Death Certificates.—A death certificate made by a physician according to the requirements of St. 1898, secs. 1024, 1024a, is admissible as a public record within St. 1898, sec. 4160, as prima facia evidence of the material facts stated therein.—State v. Pabst, Wis., 121 N. W. 351.

48.——Declarations.—Declarations of claimants of homestead, as to their intention to return thereto, are admissible on the question of abandonment, though they may be self-serving.—Thigpen v. Russell, Tex., 118 S. W. 1080.

49.——Judicial Notice.—The state courts will take judicial notice of federal statutes.—Louisville & N. R. Co. v. Scott, Ky., 118 S. W. 990.

50.——Market Reports.—A witness was properly allowed to testify as to the state of the cattle market on certain days, and state that he gained his information from market reports.—St. Louis & S. F. R. Co. v. Lane, Tex., 118 S. W. 847.

51.——Opinions.—Market value is largely a matter of opinion; and a witness acquainted with the market value of property at a particular place is competent to state his opinion.—Chicago, R. I. & G. Ry. Co. v. Jones, Tex., 118 S. W. 759.

52.——Varying Written Contract.—A question as to whether plaintiff intended to pass title by indorsement of the note to his daughter held not objectionable as varying the legal effect of the indorsement by parol.—Nolan v. Nolan, Cal., 101 Pac. 520.

53. **Executors and Administrators**—Attorney's Fees.—A personal representative is individually liable to an attorney for services rendered the estate.—Hall v. McGregor, W. Va., 64 S. E. 736.

54. **Fire Insurance**—Forfeiture.—The failure of insured to keep an account of his cash sales of goods, as required by his policy, is a forfeiture of the insurance as a matter of law.—Scottish Union & National Ins. Co. v. Weeks Drug Co., Tex., 118 S. W. 1086.

55.——Mortgage on Part of Property.—A policy of insurance, which is to be void if the "subject of insurance" be mortgaged, held not rendered void by a mortgage on a part of the property.—Mecca Fire Ins. Co. of Waco v. Wilderspin, Tex., 118 S. W. 1131.

56. **Fraud**—False Representations.—To support an action of deceit, it must appear that the party parted with value on the faith of the false representation.—Garbutt Lumber Co. v. Walker, Ga., 64 S. E. 698.

57. **Frauds, Statute of**—Authority to Sell Land.—The contract of an agent in the name of his principal for the sale of lands is void under the statute of frauds, unless the agent's authority is in writing.—Ross v. Craven, Neb., 121 N. W. 451.

58.——Effect of Partial Delivery.—An oral contract of sale of corn is taken out of the statute of frauds by a shipment of a part of the corn by the seller.—J. H. Teasdale Commission Co. v. Keckler, Neb., 120 N. W. 955.

59.——Sale of Standing Timber.—Contract of sale of standing timber held required to be in writing.—Childers v. Wm. H. Coleman Co., Tenn., 118 S. W. 1018.

60. **Fraudulent Conveyances**—Effect as Between Parties.—Conveyance by debtor to defraud creditors held binding between the parties.—Robertson v. Hefley, Tex., 118 S. W. 1159.

61. **Garnishment**—Abuse of Process.—A judgment debtor may legally assist his creditor to obtain payment of a debt due from a garnishee, and do, in the garnishment proceeding, what he might lawfully do in a proceeding in his own name and behalf.—Board of Home Missions of the Presbyterian Church of the United States v. Maughan, Utah, 101 Pac. 581.

62. **Guardian and Ward**—Termination of Relation.—The death of the ward terminates the guardianship, and the relation of guardian and ward will thereafter only be regarded as continuing for the purpose of making a final settlement of the guardian's accounts.—Whittemore v. Coleman, Ill., 88 N. E. 228.

63. **Homestead**—Abandonment.—The abandonment of a homestead by removal therefrom depends on whether the removal was with the fixed intention of not returning to the place as a home.—Thigpen v. Russell, Tex., 118 S. W. 1080.

64.——Mortgage.—A debtor who has mortgaged an existing homestead may insist that recourse be had last to the homestead property, though by so doing the security of other creditors is impaired or destroyed.—Nolan v. Nolan, Cal., 101 Pac. 520.

65. **Husband and Wife**—Alienating Husband's Affection.—A wife has a right of action for maliciously enticing her husband away from her and depriving her of his society.—Messervy v. Messervy, S. C., 64 S. E. 753.

66. **Interstate Commerce**—Authority and Functions.—The Interstate Commerce Commission held not to have jurisdiction over actions for damages to interstate shipments.—Louisville & N. R. Co. v. Scott, Ky., 118 S. W. 990.

67. **Intoxicating Liquors**—Sale to Minors.—Where a barkeeper sells liquors to a minor or habitual drunkard, the proprietor will be held responsible, in the absence of evidence that the sales were made in violation of his orders.—In re Berger, Neb., 120 N. W. 960.

68. **Judgment**—Non Obstante Verdicto. — A judgment non obstante verdicto must be based on what the pleadings show, and not from deductions from the evidence.—Stevenson v. Moore, Ky., 118 S. W. 951.

69. **Licenses**—Occupation.—In the prosecution of a corporation for engaging in a specified business without an occupation license, it is no defense that in engaging in such business defendant exceeded its corporate powers.—United States Fidelity & Guaranty Co. v. Commonwealth, Ky., 118 S. W. 1000.

70. **Life Insurance**—Delivery.—An actual delivery of a life policy to insured held not essential to complete the contract.—Rose v. Mu-

tual Life Ins. Co. of New York, Ill., 88 N. E. 204.

71.——Rescission of Policy.—The death of insured does not excuse insurer electing to rescind from seasonably returning, or offering to return, the premiums paid for the policy.—American Central Life Ins. Co. v. Rosenstein, Ind., 88 N. E. 97.

72. **Limitation of Actions**—Conditional Legacy.—Where a conditional legacy was not to be paid to claimant until she, having performed the condition, became 21 years of age, her right of action to recover the legacy did not accrue until that time.—Geisel's Estate v. Landwehr, Ind., 88 N. E. 105.

73.——Contracts.—Action on contract to furnish certain items annually during the life of obligee held barred by limitation as to all items that should have been furnished more than five years before the action.—Krbel v. Krbel, Neb., 120 N. W. 935.

74.——Mortgages.—The running of the statute of limitations, as against grantee assuming a mortgage debt, may be suspended by the absence of the grantee from the state.—Hendricks v. Brooks, Kan., 101 Pac. 622.

75. **Malicious Prosecution**—Want of Probable Cause.—The question of the existence of malice and want of probable cause in an action for malicious prosecution held for the jury, unless the testimony is so clear that all reasonable minds must agree in reaching the same conclusion.—Krehbiel v. Henkle, Iowa, 121 N. W. 378.

76. **Master and Servant**—Assumed Risk.—A servant does not assume the risk of injury from failure of the master to perform a statutory duty.—United States Cement Co. v. Cooper, Ind., 88 N. E. 69.

77.——Incompetent Fellow Servant.—A complaint in an action against a master for injuries because of the employment of incompetent servants must allege that the master knew of the incompetency, or by the exercise of reasonable care could have known of it.—Pennsylvania Coal Co. v. Bowen, Ala., 49 So. 305.

78.——Injury to Servant.—A railroad company must use reasonable care to have its roadbed free of obstructions calculated to injure its employees.—Ft. Worth & D. C. Ry. Co. v. Anderson, Tex.. 118 S. W. 1113.

79.——Negligence.—Failure of a master to comply with the requirements of Burns' Ann. St. 1908, sec. 8029, held negligence per se.—United States Cement Co. v. Cooper, Ind., 88 N. E. 69.

80.——Term of Contract.—If no time is fixed in a contract of employment, and there is no stipulated period of payment, the contract may be terminated at the will of either party.—Currier v. W. M. Ritter Lumber Co., N. C., 64 S. E. 763.

81. **Mechanics' Liens**—Construction of Statute.—The rule calling for a strict construction of statutes in derogation of the common law does not apply to mechanic's lien statutes.—Braeckel v. Shade, Mo., 118 S. W. 1196.

82.——Property Subject.—A public school building, title to which is vested in a board of trustees, is not subject to a mechanic's lien for material furnished for its construction.—Morganton Hardware Co. v. Morganton Graded School, N. C., 64 S. E. 764.

83. **Mines and Minerals**—Leases.—A lease of land to explore for oil and gas held not to give title thereto until found.—Gillespie v. Fulton Oil & Gas Co., Ill., 88 N. E. 192.

84. **Mortgages**—Assumption of Mortgage.—Acceptance of a deed, in which the grantor warrants the land free from all incumbrances except a certain mortgage, "which grantee assumes and agrees to pay," binds the grantee to pay the mortgage.—Hendricks v. Brooks, Kan., 101 Pac. 622.

85.——Foreclosure.—A power of sale in a mortgage is a prerequisite to a right to foreclose by advertisement.—Bryan v. Straus Bros. & Co., Mich., 121 N. W. 301.

86. **Negligence**—Contributory Negligence.—Where, notwithstanding the continuance of plaintiff's negligence up to the instant of the accident, defendant had actually discovered his peril and appreciated or ought to have appreciated the danger, and by ordinary care could have avoided the injury, defendant is liable.—Bourrett v. Chicago & N. W. Ry. Co., Iowa, 121 N. W. 380.

87. **Nuisance**—Action for Damages.—In an action for a nuisance, plaintiff must show injury, but not necessarily a special and peculiar injury, different from others similarly situated.—McManus v. Southern Ry. Co., N. C., 64 S. E. 760.

88. **Parent and Child**—Right to Child's Earnings.—A father's right to a child's earnings may be surrendered by a failure to provide the child a home, by ill treatment, neglect, or cruel conduct, by becoming dissolute and degraded, or by emancipation.—Rounds Bro. v. McDaniel, Ky., 118 S. W. 956.

89. **Partnership**—Applying Firm Assets to Individual Debt.—A partner cannot apply assets of the firm to his individual debt, irrespective of whether the creditor knows it is firm property.—Blake v. Third Nat. Bank, Mo., 118 S. W. 641.

90.——Creation of Relation.—The mere fact that a wife renders valuable services in managing the business of the firm conducted in the name of her husband and another does not make her a partner in the business.—Keuper v. Mette's Unknown Heirs, Ill., 88 N. E. 218.

91.——Dissolution.—Upon the dissolution of a partnership by death, title to the personal estate vests in the surviving partner as trustee to wind up the business.—Didlake v. Roden Grocery Co., Ala., 49 So. 384.

92.——Liability After Expiration of Corporate Charter.—By the laws of Iowa the stockholders of a corporation which continues to do business after its charter has expired cannot be held as partners in the absence of a statute imposing such liability.—Wasson v. Boland, Mo., 118 S. W. 668.

93.——Sale of Good Will.—Ratification by a partner of the act of the copartner selling the good will of the firm can only be accomplished by the partner accepting the benefits of the sale with full knowledge of all the circumstances.—Griffing v. Dunn, S. D., 120 N. W. 890.

94.——What Constitutes.—The sharing of gross returns with or without a common interest in the property from which the returns come held not in itself to create a partnership.—Tyson v. Bryan, Neb., 120 N. W. 940.

95. **Pleading**—Amendments.—The propriety of amending a complaint to conform to proof stated.—Bieri v. Fonger, Wis., 120 N. W. 862.

96.——Demurrer.—A complaint setting forth

several causes of action in form as a single cause of action is not demurrable on the ground that several causes of action have been improperly united.—Duncan v. E. Jones Co., S. C., 64 S. E. 749.

97. **Principal and Agent**—Knowledge of Agent.—Where an agent of the payee of a note received a payment from the maker with knowledge of the insolvency of the maker, the payee was chargeable therewith, though the agent learned of the maker's insolvency prior to the beginning of his agency.—Wright v. Hooker, Tex., 118 S. W. 765.

98. **Principal and Surety**—Building Contractor's Bond.—A building contractor's bond executed by a paid surety is to be considered strictly against the latter, if susceptible of more than one interpretation.—Lesher v. United States Fidelity & Guaranty Co., Ill., 88 N. E. 208.

99. **Railroads**—Carriage of Passengers. — A passenger on a mixed train held required to exercise care commensurate with the increased dangers ordinarily incident to the management of such trains.—Suttle v. Southern Ry. Co., N. C., 64 S. E. 778.

100.——Crossing Accidents.—A railroad company is only required to use ordinary care to prevent crossing accidents.—Garber v. St. Louis Southwestern Ry. Co. of Texas, Tex., 118 S. W. 857.

101.——Duty of Person Driving Across Tracks.—A traveler is not required to stop his team or get off his wagon unless he knows that a train is approaching.—Garver v. St. Louis Southwestern Ry. Co. of Texas, Tex., 118 S. W. 857.

102.——Regulation.—Rev. St. 1895, art. 4571, imposing a penalty for the failure of a railroad company or its officers to furnish information required by the Railroad Commission, is highly penal and must be strictly construed.—State v. Gulf, C. & S. F. R. Co., Tex., 118 S. W. 736.

103.——Right of Way.—Enhancement of property by construction of a railroad held sufficient consideration for a deed of right of way.—United Investment Co. v. Los Angeles Interurban Ry. Co., Cal., 101 Pac. 543.

104. **Release**—Joint and Several Contracts.—Where a joint and several contract provides that each of the obligors shall perform specific obligations, a release of one of the obligors will not discharge the others.—Krbel v. Krbel, Neb., 120 N. W. 935.

105. **Religious Societies**—Incorporated Societies.—Incorporated religious societies, are, in this country, civil bodies politic, and are amenable to the ordinary courts of the state, and governed by the statute under which they are organized, so far as statutory regulations are prescribed—Klix v. Polish Roman Catholic St. Stanislaus Parish, Mo., 118 S. W. 1171.

106. **Sales**—Part Performance.—A buyer, under an executory contract of sale, cannot accept part performance and at the same time repudiate the contract.—Wolfert v. Caledonia Springs Ice Co., N. Y., 88 N. E. 24.

107.——Performance.—Ordinarily the purchaser need not pay the purchase money until he received the thing purchased.—Delaware Trust Co. v. Calm, N. Y., 88 N. E. 53.

108.——Rescission.—Where a contract of sale is invalid for mistake or fraud, and a party thereto seeks by replevin of the goods to rescind the contract, he must first return what he has received.—Duluth Music Co. v. Clancy, Wis., 120 N. W. 854.

109. **Street Railroads**—Duty to Look and Listen.—A person need not always look and listen for approaching cars before going on a street railroad track, and the measure of ordinary care may be satisfied by the exercise of either the sense of hearing or sight.—Northern Texas Traction Co. v. Hunt, Tex., 118 S. W. 827.

110.——Injury to Alighting Passengers.—A street car conductor, who starts his car at a time when he knows a passenger is alighting, is negligent as matter of law.—Jirachek v. Milwaukee Electric Ry. & Light Co., Wis., 112 N. W. 326.

111. **Tenancy in Common**—Adverse Possession.—The possession of land by a tenant in common may become adverse, if he, by his acts and conduct, disseises his co-tenants by repudiating their title and claims adversely to them.—Carpenter v. Fletcher, Ill., 88 N. E. 162.

112. **Trade Mark and Trade Names**—Nature of Right.—The exclusive right to use as a trademark or trade-name words, letters, or symbols to indicate the quality of goods to which they are affixed cannot be acquired.—Avenarius v. Kornely, Wis., 121 N. W. 336.

113. **Trusts**—Purchase from Trustee.—Where a purchaser of land knows that he is dealing with a trustee in relation to trust property, he cannot claim to be a bona fide purchaser if the trustee is unauthorized to sell the land.—Gibney v. Allen, Mich., 120 N. W. 811.

114. **Usury**—Personal Nature of Defense.—The defense of usury is personal to the debtor and his privies.—Fenby v. Hunt, Wash., 101 Pac. 492.

115.——Recovery of Usurious Payments.—One who pays usury, in the absence of statutory provision, may recover the excess over the legal rate and interest from the date of the payments.—Baum v. Daniels, Tex., 118 S. W. 754.

116. **Vendor and Purchaser**—Bond for Title.—Where the purchase price has been paid, a bond for title to land operates to convey to the grantee an equitable title.—Wright v. Riley, Tex., 118 S. W. 1134.

117.——Cancellation of Contract.—A vendee, seeking to cancel a contract for the sale of land for misrepresentations by the vendor as to its location, held not required to prove that the misrepresentations were with a fraudulent intent, though so alleged.—Stevenson v. Cauble, Tex., 118 S. W. 811.

118.——Constructive Notice.—Actual possession and occupancy of land constitute notice to a subsequent purchaser and incumbrancer of the rights of the occupant.—Brady v. Sloman, Mich., 120 N. W. 795.

119.——Denial of Vendor's Title.—Estoppel against a vendee to deny the title of his vendor does not apply, where the vendee was already in possession of the land, claiming it as his own.—Nashville, C. & St. L. Ry. v. Proctor, Ala., 49 So. 377.

120.——Duty to Furnish Abstract of Title.—Unless the contract so provide, a vendor of land is not required to furnish an abstract of title.—Thompson v. Robinson, W. Va., 64 S. E. 718.

121. **Waters and Water Courses**—Surface Waters.—In an action to restrain diversion of surface water, so that it flows upon the land of a neighbor, a decree may specify the character of the ditch to be maintained by defendants upon their own property.—Cronin v. Payne, Mich., 121 N. W. 290.

122. **Wills**—Acceptance of Legacy.—The acceptance of a legacy with full knowledge of all the facts will bar a legatee from contesting the will, even in absence of an agreement by her not to contest it; such an agreement adding nothing to the effect of her acceptance.—Dougherty v. Gaffney, Ill., 88 N. E. 150.

123.——Construction.—In the construction of a will the court may look at the circumstances under which testator made it, the state of his property, his family, and the like.—Armstrong v. Barber, Ill., 88 N. E. 246.

124.——Construction.—Where a devise to testator's niece for life, and to her progeny, if any, but, in case she died without issue, then to his heirs, the limitation over became effective, if at all, at the niece's death; the failure of issue referred to meaning a failure at her death, and not an indefinite failure, independently of Rev. Laws 1902, c. 134, sec. 5.—Baxter v. Bickford, Mass., 88 N. E. 7.

125.——Deeds.—A deed which is not to take effect until the death of the grantor is void, as an attempt to make a testamentary disposition of property without complying with the statute of wills.—Ackman v. Potter, Ill., 88 N. E. 231.

A Corporation Lawyer in Trouble

AS ADAMS entered the private office of Burgess, of the firm of Burgess & Webster, attorneys, he found his friend with a disgusted scowl on his face, savagely biting the end of his pencil. He took in the situation at a glance. The dozen or more bulky law books opened and scattered about the desk, the scrawls on the scratch pad, the scowl and the bitten pencil reminded him forcibly of some of his own past experiences.

"What's your trouble, old man? I know the symptoms."

"Adams, you are a corporation lawyer. Sit down and tell me a way out of this mess," pointing at the books before him. "It's almost a case of 'Water, water everywhere, and not a drop to drink.' In the most classic vernacular, 'I am up against it.' "

"What's the question?" asked Adams.

"Well," said Burgess, "you know this legislature of ours has a nasty habit of passing every little while some law decidedly inconvenient, to say the least, for some of our clients."

Adams nodded, with an appreciative smile.

"At the last session of this lamented body," Burgess continued, "they passed a law, as you know, regulating the employment and payment of men, women and children. The act strikes naturally at corporations, was so intended, and it imposes a severe penalty for every violation. The president of the Miller Manufacturing Company has just phoned me to prepare an opinion for their board. There's the charter—a special act with no power reserved to alter, amend or repeal. This new act regulates the employment, the time of paying, and the hours per day of the workmen, including the women and children. It is practically impossible—ruinous, at least—for this particular corporation to comply with all the provisions of this act. Now, is this corporation protected? Is its charter subject to legislative invasion? How far can a legislature go in the regulation of existing corporations under that elastic notion of police power? Can a legislature regulate or interfere in the matter of contracts between employers and employes? Haven't you looked into the question for some of your clients?"

"What do you find on the subject here?" said Adams, disregarding his question for a moment and indicating the small library strewn out on the desk.

"Not a thing," said Burgess, disgustedly. "That is to say, nothing that helps. One author of a four-volume work has but two lines on the most important of all the questions—and the rest of them don't seem to touch it at all."

"What authorities have you?"

"About all there are, I guess, but all told they are not worth a picayune on these questions."

Adams looked at the titles of all the books.

"Well, those are all good works, but I never use any of them any more. They do not contain all the law, and they are not the latest. The fact is that, aside from my digest and reports, there is only one work on corporations that I now use. It is the latest and it has everything. It cites all the cases, too. Why, I settled this whole matter in less than an hour, and have advised three of my clients just what they must do."

"Say, Adams, I'm from Missouri."

"You want to be shown? All right. Come over to my office, and I'll show you."

When they reached his office, Adams sat down at his desk, drew up a chair for Burgess, and took from a small book rack at his side a large compact volume, neatly bound in buckram, and handed it to Burgess. The latter glanced at the labels on the volume and read:

"Hmm! Thompson on Corporations, Second Edition. I had this work offered to me, but I have the first edition, and I turned this down."

"So did I," said Adams, "but the salesman showed me how different in every way this edition is from the other. He persuaded me to examine the book and then I knew that I could not get along without it."

"Hmm! Well, let's see whether it will give me any help or not."

"Your questions are answered in the first volume," said Adams, "because they have to do with organization, in connection with Interpretation and Amendment of Charters, Title Three. You see that Chapter Eleven covers Construction and Interpretation of Charters,

and Chapter Twelve is Constitutional Protection. Here are forty large, meaty sections, and look at the cases! In these chapters you will find all the principles, supported by all the cases on your preliminary questions. Now turn to Title Four, State Control. Chapter Fourteen on Police Power has forty large sections. Turn to Section 435 and the following sections. Look at the titles—435, Regulation of Contracts Between Employer and Employe; 436, Regulation of Hours of Labor—Eight-Hour Law; 437, Regulation of Hours of Labor for Women and Children; 438, Regulation of Hours of Labor as to Municipalities; 439, Regulation of Payment of Wages."

"Great Heavens! What a chump I was! Look at the cases—right up to date—some of them are not yet officially reported, and citations in duplicate to the Reporter System, to the L. R. A. and to the American State Reports. It even indicates the special cases that are supplemented by annotations. That's another trouble with these other authors—they don't cite the Reports that a man has in his library. Is all of it like this?"

"Every volume. Now look at that chapter on Organization Under General Laws. Look at this definition of a de facto corporation in Section 226, the only full definition you can find, and it's a peach. I tried for half a day to pick a flaw in it and failed. Look at these articles on Cumulative Voting and Voting Trusts. And this treatise on By-Laws—over one hundred pages. You won't find anything like it anywhere else."

By this time Burgess was thoroughly interested.

Adams continued: "The whole work is just like that. It is absolutely complete on every question I have had to investigate. Besides, it is the best analyzed and the best arranged book I ever saw. Everything comes along just as it naturally arises in the life of the corporation—a chronological arrangement, I believe they call it. You see what is in Volume One—everything up to the time the corporation is ready to do business. The second one begins with the Directors, Officers, Agents and Corporate Contracts. Then we have Corporate Powers, Franchises, Eminent Domain, Ultra Vires and Actions. Under Actions there is a full treatment of the whole subject of Corporate Procedure. The fourth volume, the publishers say, is to cover Stock and Stockholders. The fifth, such miscellaneous topics as Foreign Corporations, Insolvency, Consolidation, Reorganization, Dissolution and Receivership. The Table of Cases and the Index are to be in a separate sixth volume."

"That sounds sensible and practical," Burgess admitted.

"Sensible? Why, it's the easiest book to use that I ever saw. The Index is not yet ready, but with this kind of an arrangement, one scarcely needs an index. A long time ago I made up my mind never again to buy a work until it was complete. In this case, I broke that resolution, and yet my conscience is clear, for each volume is complete in itself. This is the best thing yet published on the subject of Corporations, and I am glad I found it out so soon."

"Well, I am much obliged to you, Adams. Let me have this volume until I can settle the question for my client. I'll send it back shortly."

Burgess returned to his own office, gathered up all the books on his desk and laid them aside. Then, before getting down to work, he carried the new volume out into the main office, glanced for a moment at the title page to see who published the book, and said to his stenographer: "Miss Davis, take a telegram, please. 'The Bobbs-Merrill Company, Indianapolis, Indiana—Express to-day all volumes now ready New Thompson on Corporations.

BURGESS & WEBSTER.'"

Burgess and Volume One of the New Thompson on Corporations settled the troublesome questions, and a full report was ready for the Miller Manufacturing Company before the office closed for the day.